UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALFRED EUGENE SHALLOWHORN, Petitioner, v. FIDENCIO N. GUZMAN, Acting Warden,[1] Respondent.	Case No. CV 23-3652-GW (JPR) ORDER SUMMARILY DISMISSING HABEAS PETITION AND DENYING MOTION FOR LEAVE TO FILE IT

On May 10, 2023, Petitioner, a state prisoner, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, challenging his 1998 convictions for first-degree murder and related crimes. Recognizing that the Petition on its face is second or successive, he also filed a motion arguing that the Petition does not fall under § 2244(b), which generally bars such

[1] Fidencio N. Guzman is substituted in under Federal Rule of Civil Procedure 25(d) as the proper Respondent because he is the acting warden of Centinela State Prison, where Petitioner is housed. See Centinela State Prison (CEN), Cal. Dep't of Corr. & Rehab., https://www.cdcr.ca.gov/Facility-Locator/CEN/ (last visited July 25, 2023); (see also Pet., ECF No. 1 at 1 (throughout, the Court uses the pagination generated by its Case Management/ Electronic Case Filing system)).

petitions without prior authorization from the Ninth Circuit Court of Appeals. Indeed, this is not Petitioner's first federal habeas petition. On July 16, 2010, the Court denied on the merits his initial petition challenging the same convictions. See Orders, Shallowhorn v. Stribling, No. CV 04-8421-SVW (JPR) (C.D. Cal. July 16, 2010) (ECF Nos. 70 & 71). The Ninth Circuit denied his request for a certificate of appealability. See Order, id. (ECF No. 81). On October 30, 2015, the Court summarily denied another petition because it was successive or second and he had not requested, much less received, permission from the Ninth Circuit to file it. See Order, Shallowhorn v. Madden, No. CV 15-8051-MMM (JPR) (C.D. Cal. Oct. 30, 2015) (ECF No. 4). On March 2, 2016, he moved under Federal Rule of Civil Procedure 60(b) to vacate the judgment in his original habeas case, but the Court denied the motion as a disguised successive petition. See Order, Stribling (ECF No. 87). The Ninth Circuit again denied his requests for a certificate of appealability. See Order, id. (ECF No. 91); Order, Madden (ECF No. 10). And on March 16, 2017, the Court denied his renewed Rule 60(b) motion. See Order, Stribling (ECF No. 93).

For the reasons discussed below, the Court recommends that the Petition be dismissed without prejudice.

PETITIONER'S CLAIMS

I. His 1998 convictions violate due process because 2019 amendments to California law render the evidence in his case insufficient to support the convictions. (See Pet., ECF No. 1 at 24-40.)

II. His continued incarceration violates due process

because amendments to California law have rendered his convictions unconstitutional. (See id. at 41-42.)

III. The state court's recent denial of his petition for resentencing under California Penal Code section 1170.95[2] violates due process. (See id. at 43-52; see also Cal. Ct. App. Suppl. Opening Br., ECF No. 3 at 8-22 (Petitioner alleging that superior court's denial of his section 1170.95 petition constituted prejudicial error).)

BACKGROUND

In February 1998, a Los Angeles County Superior Court jury convicted Petitioner of conspiracy to commit murder and three counts of first-degree murder and found true his personal use of a firearm and other special circumstances. (See Pet., ECF No. 1 at 2; Cal. Ct. App. Suppl. Opening Br., ECF No. 3 at 5.) In July 1998, he was sentenced to three consecutive life terms without the possibility of parole. (See Pet., ECF No. 1 at 2; id., Ex. B at 59.)

In January 2019, Senate Bill 1437

> was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, §

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[2] Section 1170.95 was renumbered to section 1172.6, effective June 30, 2022. See Walker v. Cal. Sup. Ct., No. CV 22-4638-CAS(E), 2022 WL 11337927, at *1 n.1 (C.D. Cal. Sept. 13, 2022).

1, subd. (f).)

People v. Martinez, 31 Cal. App. 5th 719, 723 (2019) (as modified on denial of reh'g). The bill enacted Penal Code section 1170.95(a) to allow those so convicted to "file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts." Id.

On December 17, 2020, Petitioner filed a section 1170.95 resentencing petition in the superior court, which denied it for failure to make a prima facie showing. (See Pet., Ex. A, ECF No. 1 at 55-57.) He appealed, and the court of appeal affirmed on September 9, 2021. (See id., Ex. B at 58-62.) On November 17, 2021, the supreme court denied his petition for review. See Cal. App. Cts. Case Info., https://appellatecases.courtinfo.ca.gov/ (search for "Alfred" with "Shallowhorn"; then follow "S271327" hyperlink) (last visited July 25, 2023). He filed a habeas petition in the supreme court (see Pet., ECF No. 1 at 53); it remains pending, see Cal. App. Cts. Case Info., https://appellatecases.courtinfo.ca.gov/ (search for "Alfred" with "Shallowhorn"; then follow "S279952" hyperlink) (last visited July 25, 2023).

DISCUSSION

I. Applicable Law

The Antiterrorism and Effective Death Penalty Act of 1996 provides, in § 2244(b), as follows:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be

dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Not all "[h]abeas petitions that are filed second-in-time are . . . second or successive." Clayton v. Biter, 868 F.3d 840, 843 (9th Cir. 2017). For example, a petition is not successive if it is based on a "new judgment" intervening between the denial of a federal habeas petition on the merits and the filing of a subsequent one. Magwood v. Patterson, 561 U.S. 320, 331-33 (2010); Brown v. Muniz, 889 F.3d 661, 667 (9th Cir. 2018) (claim in second petition is not successive "if it is based on an intervening state court judgment . . . notwithstanding that the same claim . . . could have been brought in the first petition" (emphasis in original)).

A state-court judgment may be "intervening" even if it leaves "in place an earlier challenged conviction and sentence." Clayton, 868 F.3d at 843-44 (citing Wentzell v. Neven, 674 F.3d 1124 (9th Cir. 2012)). Thus, in Clayton, in which the petitioner challenged the denial of a resentencing petition filed under a different state-law provision than the one at issue here, the Ninth Circuit held that the resentencing petition's denial "result[ed] in the entry of a new appealable order or judgment" and therefore his claim challenging that denial wasn't successive. Id. at 844; see Young v. Cueva, No. CV 20-8304-CJC(E), 2020 WL 8455474, at *2 (C.D. Cal. Oct. 27, 2020) (finding that "denial of a petition for resentencing" constituted "new judgment" and that petitioner's challenge to that denial and not conviction itself was not successive).

But when a second-in-time petition concerns the same judgment as that challenged in a prior federal petition that was denied on the merits, the general prohibition on unauthorized

second or successive petitions bars consideration of the second petition without prior authorization from the court of appeals. See Burton v. Stewart, 549 U.S. 147, 153 (2007) (per curiam) (district court properly dismissed petitioner's second habeas petition for lack of jurisdiction when he "twice brought claims contesting the same custody imposed by the same judgment of a state court" without first obtaining authorization from circuit court).

II. Analysis

A. The Petition's claims challenging Petitioner's 1998 convictions are successive

Ground one alleges that "after amendments to California law, the evidence in [Petitioner's] case is constitutionally insufficient to support his murder convictions and his conviction of conspiracy to murder" (Pet., ECF No. 1 at 24), and ground two claims that "the lack of sufficient evidence . . . renders Petitioner's convictions for murder and conspiracy unconstitutional" (id. at 42).[3] Such claims challenge the same

[3] Petitioner's "Motion to File Petition" relies on many of the same cases as a similar motion accompanying his summarily dismissed 2015 petition. (Compare Mot. File Pet., ECF No. 2, with Mot. File Pet. Habeas Corpus, Madden (ECF No. 3).) To the extent he argues that the factual predicate for his current claims did not exist until state law changed in 2019 (see Mot. File Pet., ECF No. 2 at 10-11) or that Fiore v. White, 531 U.S. 225 (2001) (per curiam), saves them (see Pet., ECF No. 1 at 41-42), his argument fails because he "does not allege that the evidence in his case never supported his conviction." Edwards v. Robertson, No. 5:23-cv-00126-MEMF-KES, 2023 WL 4111372, at *8 (C.D. Cal. June 21, 2023) (holding that "change in state law 'does not invalidate a conviction obtained under an earlier law'" (quoting Kleve v. Hill, 243 F.3d 1149, 1151 (9th Cir. 2001)). Petitioner also alleges that applying § 2244(b) to bar his claims would violate the Suspension

1998 judgment as Petitioner's initial federal habeas petition, from 2004, which was denied on the merits with prejudice in 2010. See Order, Stribling (ECF No. 70). Although the Petition's first two claims are premised in part on changes Senate Bill 1437 made to California law (see, e.g., Pet., ECF No. 1 at 24, 27, 41), they attack and seek to "vacate[]" the 1998 convictions (id. at 42) rather than the denial of his section 1170.95 resentencing petition. Indeed, he checked the box on the form petition indicating that he was challenging "a conviction and/or sentence." (Id. at 2.)

The state court's denial of Petitioner's section 1170.95 resentencing petition between the denial of his last federal habeas petition and the filing of this one does not alter the result. The superior court denied the resentencing petition in its entirety and did not disturb Petitioner's original judgment. (See Pet., Ex. A, ECF No. 1 at 55-57.) As such, no intervening new judgment saves the Petition's claims challenging the 1998 convictions from being impermissibly successive. Compare Cole v. Sullivan, 480 F. Supp. 3d 1089, 1096-97 (C.D. Cal. 2020) (denial of resentencing petition under section 1170.95 did not "open the door for a petitioner to bring a new challenge to an old conviction that already has been challenged"; distinguishing Clayton), with Magwood, 561 U.S. at 323-24, 339 (petitioner's second-in-time federal habeas petition was not impermissibly

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Clause. (Mot. File Pet., ECF No. 2 at 13-18.) But the "Supreme Court upheld § 2244(b) as consistent with the Suspension Clause of the United States Constitution in Felker v. Turpin, 518 U.S. 651, 664 (1996)." Brown v. Muniz, 889 F.3d 661, 668 n.3 (9th Cir. 2018).

successive when state court imposed new sentence after his first federal habeas petition was granted); Wentzell, 674 F.3d at 1125 (petitioner's second habeas petition was not impermissibly successive when state court amended judgment of conviction after his first federal habeas petition was denied). Under § 2244(b), then, Petitioner was required to secure an order from the Ninth Circuit authorizing these claims before he filed them. See Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001) (per curiam). A review of the Ninth Circuit's docket indicates that he has not asked for or obtained any such order.

Petitioner spends a good portion of his motion for leave to file the Petition analogizing to the law governing those seeking to file successive challenges to federal convictions, who have resort to a statutory "escape hatch" in circumstances allegedly similar to his — that is, when the statutory law governing the challenged conviction has been amended favorably. (See Mot. File Pet., ECF No. 2 at 16-18.) But the U.S. Supreme Court recently held that the escape hatch does not apply in such circumstances. See Jones v. Hendrix, 143 S. Ct. 1857, 1864 (2023). Thus, this argument does not help Petitioner.

For all these reasons, the Petition's first two claims are successive, have not been authorized by the Ninth Circuit, and must be summarily dismissed. See Burton, 549 U.S. at 153.

B. The Petition's claim challenging the state court's denial of the resentencing petition is not cognizable on federal habeas review

Ground three alleges that the state court "misinterpreted both the law and the facts" when denying Petitioner's

resentencing petition.[4] (Pet., ECF No. 1 at 43 (emphasis in original).) Even if that denial resulted in an intervening judgment and rendered the claim not successive, see Clayton, 868 F.3d at 843-44; Young, 2020 WL 8455474, at *2; but see Cole, 480 F. Supp. 3d at 1096-97, Petitioner could not gain relief because "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (2009) (citing Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)). Federal courts have routinely held that challenges to denials of section 1170.95 resentencing petitions "pertain solely to the state court's interpretation and application of state sentencing law and therefore are not cognizable" on federal habeas review. Cole, 480 F. Supp. 3d at 1097; Allen v. Montgomery, No. 19-1530-VBF (PLA), 2020 WL 1991426, at *13 (C.D. Cal. Jan. 7, 2020) (same), accepted by 2020 WL 6321762 (C.D. Cal. Oct. 26, 2020), cert. of appealability denied, No. 21-55080 (9th Cir. Apr. 28, 2022); see also Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam) ("[A] state court's interpretation of state law . . . binds a federal court sitting in habeas corpus.").

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[4] As noted above, Petitioner's May 2023 habeas petition remains pending before the supreme court. See Cal. App. Cts. Case Info., https://appellatecases.courtinfo.ca.gov/ (search for "Alfred" with "Shallowhorn"; then follow "S279952" hyperlink) (last visited July 25, 2023). Thus, his claim might not yet be exhausted. See § 2254(b). But Petitioner's failure to exhaust does not preclude the Court from adjudicating the claim because it may dismiss an unexhausted claim if it finds on de novo review that it is not even colorable. Cf. 28 U.S.C. § 2254(b)(2); Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005) (court may deny unexhausted claim on merits "when it is perfectly clear that the applicant does not raise even a colorable federal claim").

Petitioner alludes to his right to due process (see Pet., ECF No. 1 at 43, 50), but that does not transform his state-law claim into a cognizable federal one. See Gray v. Netherland, 518 U.S. 152, 163 (1996) (explaining that petitioner may not convert state-law claim into federal one by making general appeal to constitutional guarantee); see also Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (habeas petitioner's mere reference to Due Process Clause was insufficient to render his claims viable under 14th Amendment); Walker v. Cal. Sup. Ct., No. CV 22-4638-CAS(E), 2022 WL 11337927, at *2 (C.D. Cal. Sept. 13, 2022) (petitioner's allegation that state court violated due process in denying section 1170.95 resentencing petition was not sufficient to transform state-law claim into cognizable federal one), accepted by 2022 WL 11269388 (C.D. Cal. Oct. 13, 2022).

In Clayton, the Ninth Circuit suggested in dictum that a petitioner challenging the denial of a resentencing petition brought under a different state statute might have a protected liberty interest in the state court's alleged failure to hold a hearing on his claim. See 868 F.3d at 846 n.2. But when a petitioner is "not entitled to resentencing under state law," failure to grant the requested relief is not "arbitrary or capricious" and does "not deprive him of due process." Cole, 480 F. Supp. 3d at 1098; see also Torricellas v. Core, No.: 22-cv-1670-MMA-KSC, 2023 WL 2544558, at *7 (S.D. Cal. Mar. 15, 2023) ("Supreme Court has not yet specified what requirements, if any, due process imposes upon state law resentencing proceedings," and that "would alone be sufficient grounds to deny the Petition because there is no 'clearly established' federal law on which

petitioner can rely" (citing Wright v. Van Patten, 552 U.S. 120, 126 (2008) (per curiam))), accepted by 2023 WL 3990053 (S.D. Cal. June 13, 2023), appeal filed, No. 23-55640 (9th Cir. July 21, 2023).

Here, Petitioner asserts that he was "denied . . . the relief to which he was entitled: A full hearing under the reasonable doubt standard on the issue of malice." (Pet., ECF No. 1 at 51-52.) But the state court found him categorically "ineligib[le] for resentencing relief under section 1170.95" (id., Ex. B at 62;[5] see id., Ex. A at 55 (superior court holding that "jury was not instructed on either the natural and probable consequences doctrine" or "the felony murder doctrine," precluding relief under section 1170.95)), and this Court is bound by that decision. Richey, 546 U.S. at 76; Cole, 480 F. Supp. 3d at 1098. Thus, this claim is not even colorable because it lacks "a viable federal question." Cole, 480 F. Supp. 3d at 1098; see also Cassett, 406 F.3d at 623-24.

ORDER

IT THEREFORE IS ORDERED that the Petition is SUMMARILY DISMISSED without prejudice to its refiling should Petitioner

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[5] The court of appeal decision attached to the Petition is missing even-numbered pages. (See Pet., Ex. B., ECF No. 1.) In those pages, the court noted that "section 1170.95 is aimed at vacating murder convictions not based on a finding that the defendant himself acted with malice" and found that each of the three theories of murder presented to the jury in Petitioner's case "required a finding that [he] himself acted with malice." See People v. Shallowhorn, No. B311337, 2021 WL 4099075, at *3 (Cal. Ct. App. Sept. 9, 2021). Indeed, Petitioner acknowledges as much. (See Mot. File Pet., ECF No. 2 at 7 (conceding that "[a]ll three theories" of guilt on which he was tried "required proof of intent to kill on Petitioner's part").)

obtain the necessary permission from the Ninth Circuit, see R. 4, Rs. Governing § 2254 Petitions in U.S. Dist. Cts. ("If it plainly appears . . . that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition."); C.D. Cal. R. 72-3.2 (authorizing Magistrate Judge to prepare order summarily dismissing habeas petition for District Judge's signature), and the motion for leave to file it is DENIED.

DATED: August 4, 2023

GEORGE H. WU
U.S. DISTRICT JUDGE

Presented by:

Jean P. Rosenbluth
U.S. Magistrate Judge